IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

HERALD COMPANY, INC., d/b/a
BOOTH NEWSPAPERS, INC. and
THE ANN ARBOR NEWS,

Plaintiffs/Appellants,

v

Docket No. 128263

EASTERN MICHIGAN UNIVERSITY
BOARD OF REGENTS,

Defendants/Appellees.

AMICUS BRIEF OF MICHIGAN ASSOCIATION OF BROADCASTERS AND MICHIGAN PRESS ASSOCIATION IN SUPPORT OF PLAINTIFFS/APPELLANTS

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STATE OF MICHIGAN
IN THE SUPREME COURT

HERALD COMPANY, INC., d/b/a
BOOTH NEWSPAPERS, INC. and
THE ANN ARBOR NEWS,

Plaintiffs,

v.

EASTERN MICHIGAN UNIVERSITY
BOARD OF REGENTS,

Defendant.
_____/

Supreme Court Case No. 128263

Court of Appeals Case No. 254712

Washtenaw County Circuit Court
Case No. GC-W-04-0000117-CZ

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STATEMENT IDENTIFYING JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Amici Curiae Michigan Association of Broadcasters (MAB) and Michigan Press Association (MPA) support the Appeal of Plaintiffs-Appellants Herald Company, Inc. d/b/a/ Booth Newspapers and the Ann Arbor News ("Ann Arbor News") from the February 15, 2005 opinion entered by the Court of Appeals in *Herald Company, Inc. v. Eastern Michigan University Board of Regents*, Case No. 254712, 2005 Mich App LEXIS 279.

MAB and MPA support Ann Arbor News's requested relief, namely:

1. An order expediting proceedings in this Freedom of Information Act ("FOIA") case, as required by MCL 15.240(5).
2. An order reversing the Court of Appeals.
3. An order requiring Defendant-Appellee Eastern Michigan University Board of Regents ("EMU") to produce immediately an unredacted copy of the September 3, 2003 letter authored by Patrick Doyle, the sole document at issue.
4. An order directing the trial court to order EMU to pay the Ann Arbor News's reasonable attorneys' fees for prosecuting this FOIA case.

QUESTIONS PRESENTED FOR REVIEW

Amici Curiae MPA and MAB incorporate by reference the Questions Presented for Review listed in the Application for Leave to Appeal of Plaintiff-Appellant the Ann Arbor News.

I. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This FOIA case involves a single document: a three-page letter written on September 3, 2003 by Patrick Doyle, then Vice President for Finance at Eastern Michigan University ("EMU"), and addressed to EMU Regent Jan Brandon ("Doyle Letter"). The Doyle Letter answered four questions that Regent Brandon had asked Vice President Doyle regarding the controversy over the high cost of the new President's residence at EMU. The Doyle Letter reputedly addresses allegations that public monies were spent improperly, and that the EMU President tried to conceal the true costs of the residence from the public.

The following facts are known about the content of the Doyle Letter, from the Opinions of both lower courts in this case and bear special emphasis:

(1) The Doyle Letter was "highly critical of the President", and therefore its disclosure would "foster accountability" and "facilitate good government." February 15, 2005 Court of Appeals Dissenting Opinion of Whitbeck, C.J. at p 8.

(2) Vice President Doyle "had decided to retire well before he wrote his letter to Regent Brandon" and did in fact resign a few days after writing the letter, so there can be no legitimate fear in this case that disclosure of the Doyle Letter might jeopardize Doyle's future job security. *Id.*

(3) The Doyle Letter contains a mixture of fact and opinion, and the trial court found that separating fact from opinion would not be easy (but therefore, by implication, could be done). March 16, 2004 Trial Court Opinion at p 3.

(4) With respect to the "facts" in the Doyle Letter, "an *in camera* review of the Doyle Letter plainly discloses that all the facts are *not* in the public record." February 15, 2005

Dissenting Opinion of Whitbeck, C.J. at p 7 (emphasis in original). Hence the public has a very strong interest in seeing the ***facts*** contained in the Doyle Letter.

(5) The public also has a very strong interest in seeing the ***opinions*** expressed in the Doyle Letter, because Vice President Doyle was a highly credible EMU executive especially knowledgeable about the President's residence. Vice President Doyle was the Vice President of Finance which means that he was also particularly qualified to render his opinions and his opinions reputedly go directly to the core FOIA issue of governmental accountability.

In the fall of 2003, the Ann Arbor News sent a series of written requests to EMU and its fund-raising arm, the Eastern Michigan University Foundation, seeking copies of various public records relating to the President's residence, pursuant to the Michigan FOIA, MCL §15.231 et seq.; MSA §4.1801(1) et seq.

In response, EMU and the Eastern Michigan University Foundation withheld the September 3, 2003 Doyle Letter ***in its entirety***. EMU's only claimed justification for withholding the Doyle Letter was, and is, the "frank communications" exemption to the FOIA, MCL §15.243(1)(m).

The frank communications exemption only permits a public body to withhold from disclosure those portions of a public record that meet ***all*** the following criteria:

(1) the material is "other than purely factual";

(2) the material is "of an advisory nature";

(3) the material is "preliminary to a final agency determination of policy or action";

and

(4) in the "***particular instance***", the public interest in encouraging frank communications between public officials and employees "***clearly outweighs***" the public interest in disclosure of the public record at issue.

See MCL §15.243(1)(m).

The Ann Arbor News filed suit and asked the trial court to review the Doyle Letter ***in camera*** and thereafter to order the letter immediately disclosed.

After receiving briefs and oral argument from both sides, and reviewing the letter *in camera*, the trial court issued its March 16, 2004 Opinion and Order. The trial court expressly found that portions of the Doyle Letter do indeed "contain some 'factual material'." The trial court also found that the "overwhelming majority" of the letter's contents were "Doyle's views concerning the President's involvement with the University House project."

With respect to the ***non-factual*** ("opinion") portions of the Doyle Letter, the trial court erroneously concluded that the "public interest in encouraging frank communications within the public body ... clearly outweighs the public interest in disclosure." With respect to the ***factual*** portions of the Doyle Letter, the trial court did ***not*** order even that "purely factual" material be disclosed. Since the "frank communications" exemption was the only FOIA exemption cited by the defendant (or the trial court) as justification for non-disclosure, and since the frank communications exemption ***by its express terms does not even apply to factual material***, and since FOIA expressly requires that exempt material be separated from non-exempt material, MCL §15.244(1), the trial court erred in not ordering the disclosure of factual material.

The Ann Arbor News timely appealed the trial court's Order, to challenge both:

(1) The trial court's clearly erroneous finding that the public interest in non-disclosure "clearly outweighs" the public interest in disclosure of the ***non-factual*** portions of the Doyle Letter; and

(2) The plain legal error that was the basis for the lower court's decision not to order disclosure, at a minimum, of the ***factual*** portions of the Doyle Letter.

After full briefing and oral argument, the Court of Appeals issued a divided decision. The majority erroneously affirmed the trial court's decision.

II. SUMMARY OF ARGUMENT

The Ann Arbor News is constitutionally entitled to the Doyle Letter. Article IX, § 23 of the Michigan Constitution of 1963 provides as follows:

> All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law.

The Doyle Letter sought by the Ann Arbor News was prepared by the Vice President of Finance and appears to have addressed the manner in which the President of the University spent public funds. In other words it is a report of public moneys and under the Michigan Constitution must therefore be open to inspection.

EMU withheld the letter solely on the basis of Section 13(m) of FOIA, known as the frank communications exception. The trial court found that the Doyle Letter contains information which it described as "not easily severable from opinion." Court of Appeals Majority Opinion of Saad, J at p. 4. Since this exemption by its terms applies only to non-factual material, and ***not*** to "purely factual" material, proper analysis requires treating the non-factual material separately from the purely factual material.

There is nothing in Section 13(m) of FOIA that allows the withholding of the factual material in the Doyle Letter. Furthermore, any such redactions would be contrary to Article IX, §23. Therefore the lower courts erred when they authorized the withholding of factual material in the Doyle Letter.

For the ***non-factual*** material, the clear unequivocal language of the statute dictates that the non-factual material may only be withheld if the public interest in non-disclosure ***clearly outweighs*** the public interest in disclosure. According to the majority opinion, the Doyle Letter was part of the investigation of the Board of Regents of the Eastern Michigan University into the expenditures of EMU funds in the building of the presidential residence. Clearly, the public interest in disclosure controls. Thus, as a report of public money, even the nonfactual portions of the Doyle Letter must be disclosed to the public in accordance with the constitution of the State of Michigan and FOIA.

III. ARGUMENT

The majority opinion in the Court of Appeals begins down the path to error by essentially elevating to primacy the authority vested in the public universities by the people through the Michigan Constitution of 1963:

> The Michigan Constitution confers enormous responsibility and authority on boards of public universities: our Constitution grants to boards of public universities the "supervision of the institution and the control and direction of all expenditures from the institution's funds." Const. 1963, Art VIII, § 6. In furtherance of this constitutional mandate, our Legislature similarly invests university boards with this significant oversight role. MCL 390.551 *et seq.* [footnotes omitted]. (Slip opinion at page 1.)

However, in granting this authority to the constitutional universities, the people did not abandon their right to review how the universities used their power. Article IX, § 23 of the Michigan Constitution of 1963 provides as follows:

> All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law.

In the view of the majority, the grant of power to the universities to spend the public's money carried with it the right to do so without accounting for the expenditures. Given the specific language of Article IX, § 23, this view is incorrect. The Michigan Constitution reserves to the people the right to see how their money is spent by their public officials.

EMU recognized its duty to reveal the comprehensive audit prepared by Deloitte & Touche, LLP, of the expenditures on the President's residence. But the constitutional provision provides that not only audit reports but "other reports" of public money shall be public records and open to inspection.

As the dissenting opinion in this case observed:

> [W]e are dealing with the direct expenditure of public funds-derived, we may reasonably assume, from a combination of taxpayer dollars and tuition payments-by the president of a major university for the construction of a residence in which he would live. Further, we are dealing with a situation in which there were allegations, confirmed at least in part by the University's report, that these expenditures were extravagant and inappropriate. Thus, the question of the president's accountability, not just to the University's Board of Regents, but also to the taxpaying public, for these expenditures is at the core of this case." Slip Opinion (Dissent), page 8.

Article IX, § 23 has been subject to little litigation, doubtless because it is so clear and the public interest so compelling. The Attorney General has held that the public universities may not withhold financial data from the public despite the broad grant of power to them. In an opinion dated July 28, 1976, before the adoption of FOIA, the Attorney General opined that the public was entitled to see the financial books and record of higher educational institutions organized under the Constitution. OAG 5042, 1976, page 549.

In the one case decided under this section, *Grayson v. Board of Accountancy*, 27 Mich App 26, 183 NW2d 424, (1970), the Plaintiff sought the names and addresses of persons applying for an accountant's license. Plaintiff took the position that when the amount of the application fee was stamped on the face of the application, the application then became an accounting record subject to disclosure under Article IX § 23 of the Constitution. The Court of Appeals disagreed. But in doing so, the Court set forth the following important principle.

> The manifest purpose of article 9, §23 is to allow the public to keep their finger on the pulse of government spending. The most expeditious way of so doing is to give the public access to summaries, balance sheets, and other such compilations which map out and correlate a myriad of financial transactions into a meaningful account. It strains one's credulity to think that the framers of the Constitution meant to allow the public to inspect every receipt, every application for licensure, and every writing evidencing a receipt or expenditure. It is totally unnecessary to give such authority to the public to achieve the purpose aforementioned and such authority could easily serve as a toll to harass governmental agencies by unreasonable demands for governmental agencies by unreasonable demands for great volumes of individual documents. We hold that the public right to information given by article 9, § 23 is best promoted, and the smooth functioning of the government best protected, by construing the words "financial records" to require more than a receipt or documents, such as the imprinted applications here.

Amici submit that in the instant circumstances, the Constitution requires that EMU produce the Doyle Letter. The Doyle Letter is more than a receipt or an application for licensure.

As noted by the Attorney General in his 1976 opinion, OAG 5042, the Michigan courts have placed Michigan in the vanguard of states calling for transparency and openness in government. From *Burton v. Tuite,* 78 Mich 363, 44 NW 282, (1889) to *Nowack v. Auditor General*, 243 Mich 200, 219 NW 749 (1928) the courts of Michigan have upheld the public right of access, especially as it pertains to financial matters.

> If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules. * * * Undoubtedly, it would be a great surprise to the citizens and taxpayers of Michigan to learn that the law denied them

> access to their own books for the purpose of seeing how their money was being expended and how their business was being conducted. There is no such law and never was in this country or in England. Id at 203-204.

This view of the right of public access is reflected in the enactment of FOIA.

The "frank communications" exemption, Section 13(m) of FOIA upon which EMU and the lower courts rely in withholding the Doyle Letter, is quite specific:

> A public body may exempt from disclosure as a public record under this act ... communications and notes within a public body ... of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. ***This exemption does not apply unless*** the public body shows that ***in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.***

MCL §15.243(1)(m) (emphasis supplied).

To the extent that the Doyle Letter describes the expenditure of public moneys, surely it is factual. To the extent it factually describes the expenditures of public moneys, the exemption claimed does not apply and disclosure is mandatory. For the courts below to rule that factual portions of the Doyle Letter may be exempted because it would be difficult to separate the factual portions of the letter from the nonfactual portions, is contrary to the specific language of the statute.

As to the nonfactual portions of the Doyle Letter, application of the exemption in Section 13(m) requires caution lest it too violate Article IX, § 23 which does not distinguish between factual and nonfactual evidence of the expenditure of public funds. By its plain language, the exemption requires that EMU carry its burden of proof with respect to ***all four*** of the elements of the exemption:

(1) Each part of the public record being withheld must be non-factual;

(2) Each part of the public record being withheld must be advisory in nature;

(3) Each part of the public record being withheld must be "preliminary" to a final agency determination of policy or action; *and*

(4) In the "particular instance", the public interest in encouraging frank communications within the public body must "clearly outweigh" the public interest in disclosure of each part of the public record being withheld.

While neither Amici nor the Ann Arbor News have a copy of the Doyle Letter, the Ann Arbor News has conceded that with respect to the non-factual ("opinion") portions of the Doyle Letter, the first three elements of the "frank communications" exemption are met. Hence the only question for the non-factual ("opinion") portions of the Doyle Letter is: has EMU carried its burden of establishing, ***on the particular facts of this case***, that the claimed interest in secrecy "***clearly outweighs***" the public interest in disclosure?

Amici respectfully submit that in measuring the public interest in disclosure versus the public interest in nondisclosure, the courts must consider the strong public interest in disclosure of matters relating to the expenditure of the public moneys as contained in Article IX, § 23. The Court of Appeals engaged in rank speculation about the harms that might arise in hypothetical future situations if frank communications were disclosed. In the process, the court ignored not the express language of FOIA.

In the "particular instance" of this case, the public interest in disclosure is both obvious and reflected in Article IX, § 23 of the Constitution. It is difficult to imagine a public interest in nondisclosure sufficient to overcome a policy of disclosure embodied in the Constitution. Certainly mere speculation rather than proofs is not sufficient to overcome a constitutional interest in access to documents bearing on the use of public monies.

The Michigan Supreme Court has repeatedly expressed great skepticism for the proposition that secrecy actually serves to encourage candor in communications within a public agency. In a FOIA case involving evaluations of school teachers and administrators, this Court

rejected the claim that such evaluations should be withheld from the public under the frank communications exemption, and expressly rejected the argument that secrecy fosters candor:

> The plaintiffs assert that the integrity of the evaluation process will be compromised by the disclosure of their personnel records. They suggest that the evaluators will be less inclined to candidly evaluate their employees if the evaluations are to be made public. **We draw the opposite conclusion. Making such documents publicly available seems more likely to foster candid, accurate, and conscientious evaluations than suppressing them because the person performing the evaluations will be aware that the documents being prepared may be disclosed to the public, thus subjecting the evaluator, as well as the employee being evaluated, to public scrutiny.** The knowledge that their efforts may be brought before the public at some distant date may encourage those who evaluate their peers to accurately reflect the achievements, or lack thereof, of those being evaluated.

Bradley v. Saranac, 455 Mich 285, 299-300; 565 NW2d 650 (1997) (emphasis supplied). *See also, Univ of Penn v. EEOC*, 493 US 182; 110 SCt 577; 107 L Ed 2d 571 (1990) (holding disclosure of evaluations of university professors would not "chill" candor); *Federated Publications, Inc v. City of Lansing*, 2000 WL 33401843 (Mich App) (unpublished decision), *aff'd in part and rev'd in part*, 467 Mich 98; 649 NW2d 383 (2002), Ct Appeals slip op at p 5 (holding that candor in police internal affairs investigations is ***not*** encouraged by withholding internal affairs records from FOIA requestors).[1]

The same finding should be made here with respect to the Doyle Letter. Disclosure of the Doyle Letter will encourage, rather than discourage, frank communications among EMU officials, because, as this Court observed in *Bradley*, disclosure of the Doyle Letter will remind public officials that they must be accountable for what they say and write.

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[1] The Court of Appeals also recently considered the frank communications exemption in *Herald Company, Inc v. Kent County Sheriff's Dept*, 261 Mich App 32; 680 NW2d 529 (2004). The *Kent County* Court found unpersuasive the Sheriff Department's claim that the public interest in "frank communications" in police internal affairs matters "clearly outweighed" the public's interest in the internal affairs files.

Accordingly, whatever "public" interest exists (if any) in the non-disclosure of the Doyle Letter must be, at best, a ***very weak*** "public" interest. By contrast, the public interest in getting to the bottom of the EMU President's involvement in, and accountability for, the high hidden costs of the President's residence is as strong as any public interest can be. It serves a value set forth in the Michigan Constitution in Article IX, § 23. Disclosure of the Doyle Letter goes to the "core purpose" FOIA: to know "what their government is up to." *Mager v. Dept. Of State Police, 460 Mich 134, 145, 595 NW2d 142 (1999). See also, International Union, United Plant Guard Workers of America v. Dept. of State Police, 422 Mich 432, 373 NW2d 713 (1985).*

The Doyle Letter is also important not only for what it undoubtedly says, but for the acumen of the speaker. Mr. Doyle was the Vice President of finance. He therefore is someone with specific credentials in the field of finance and was in an especially propitious position to discuss the manner in which the President spent the public's moneys. He may also have cast some light on the supervision or lack thereof by the Board of Regents who, after all, are in charge of the institution.

CONCLUSION

The issues in this case have "significant public interest", as amply demonstrated by the passionate opinions written by both the Majority and the Dissent in the Court of Appeals, and this case is "one ... against the state or one of its agencies." Moreover, these issues "involve legal principles of major significance to the state's jurisprudence", for as Chief Judge Whitbeck observed, the Court of Appeals opinion, **if left uncorrected, essentially renders the FOIA a dead letter in this State.**

Finally, the decision of the Court of Appeals is – not just in the judgment of Plaintiff-Appellant, but also in the judgment of the Chief Judge of the Court of Appeals – "clearly

erroneous" and one that will "cause material injustice" if left uncorrected. The Court of Appeals here committed clear error when it ignored the plain language of the FOIA, the persuasive reasoning of this Court in *Bradley*, and failed to consider the constitutional mandate of public access to records bearing on the expenditure of public money. Accordingly, it is clear that the Court of Appeals decision must be reversed, the Doyle Letter must be produced, and EMU must be ordered to pay Plaintiffs/Appellants' attorneys fees.

Respectfully submitted,

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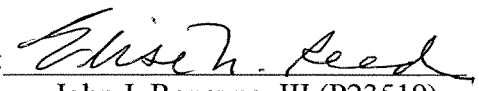
By: 
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